Supreme Court, U.S.
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No. 97-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Petitioner,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX E

PORTION OF TRIAL TRANSCRIPT RAISING EDE ISSUE AND THE MAGISTRATE'S DENIAL [T.p.2342-2345]

* * * * *

[2342]

MR. METZ: Just one thing that's still sort of hanging, Your Honor, was during the trial that issue about the mutual insurance companies, and I think the witnesses were supposed to leave information with the Court as to that. And I think I filed a memo on that.

THE COURT: What is your position now on that?

MR. METZ: Just that we don't forget about it, that I think I refrained from bringing it up before the jury until the Court would have an opportunity to make a decision on that. I think we had agreed that we would allow the Court to consider

[2343]

that, and if --

THE COURT: Did those witnesses have an ownership

interest in any of those insurance companies?

MR. METZ: I don't know about ownership, but the Ede case syllabus doesn't say ownership; it says mutuality of liability carriers. They didn't get into ownership. And that's my point, that the Ede case is what it is. It doesn't say that the physician has to be a mutual company or an owner, just mutuality of the liability carrier, and the syllabus is the law of Ohio, and certainly, if the Supreme Court wanted to limit it to mutual insurance companies only, it could have done so in the case because that was the facts from which the case came out. But that's not what made it into the syllabus. The syllabus is broader and says mutuality is the issue, and I guess that's my position. So I would ask that the jury be instructed as to that, as to that mutuality.

THE COURT: Mr. Lyon, do you oppose that?

MR. LYON: Yes, Your Honor. I think first --

THE COURT: Just a minute. Let me just ask you a question here. The only question I want to know the answer to is this. If you are satisfied that you don't have a reversible error situation in the case,

[2344]

my inclination is not to instruct the jury about insurance. Mr. Metz is representing this as a syllabus in an Ohio Supreme Court case.

MR. LYON: Your question to me is do I --

THE COURT: I know that strategically you don't want the jury to hear about insurance, but I want you to make sure that, if I was to rule in your favor and you prevailed in

this case, you wouldn't have to try it again because of this ruling.

MR. LYON: I'm not concerned about that, Your Honor. I do oppose it, and I don't believe that, just for the record, for Mr. Metz's sake, I was supposed to do this before. Dr. Kennealy is insured by Medical Protective of Ft. Wayne, Indiana, as is Dr. Noyes, as is Dr. McClellan for that matter, but he was a subsequent treater, may not fall into this. I don't believe that that case has anything to do with malpractice insurance policies, the type of which Medical Protective issues and these gentlemen have, primarily because I think the case had to do with a PIE Mutual Insurance Company wherein each physician did have a stake, small as it may be, but did have stakes and were mutual owners in the company. That's my view.

THE COURT: There is a statement from Dr.

[2345]

Miller that's been put into the record, won't go to the the jury. You're supposed to put in statements regarding anyone else. Just make sure that you do that so the record shows what the insurance is. And I'm going to deny the motion to instruct the jury on insurance, because I think it's far too prejudicial. Now, then, that takes us to Mr. Lyon's argument.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Barbara Gleason, et al.	)	**JUDGMENT IN A**
	)	**CIVIL CASE**
v.	)	
	)	CASE NUMBER:
Dr. Frank R. Noyes, et al.	)	C-1-93-520

_____/

Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury's verdict is in favor of all the defendants--

September 8, 1995

/s/_____
Kenneth J. Murphy, Clerk

APPENDIX G

PORTION OF PETITIONER'S MOTION FOR NEW TRIAL RAISING EDE ISSUE [P.65-66 OF JOINT APPENDIX]

* * * * *

[65]

Ede v. Atrium South OB-GYN, Inc., (1994), 71 Ohio St.3d 124

In determining state law, the state's highest court are accorded the greatest weight by the federal court. In diversity cases, the federal courts must apply state law in accordance with the then controlling decision on the highest state court. (Vandenbark v. Owens-Illinois Glass Co., 311 US 538, 85 LEd 327, 61 S.Ct. 347; Grantham & Mann, Inc. V. American Safety Products, Inc., (1987, CA6 Tenn), 831 F.2d 596.

[66]

The plaintiff raised throughout the trial the issue of "commonality of insurance" between defendants and several of defense expert witnesses.[1] As the court may recall, prior to

[1] The Ohio Supreme Court in the recent decision of Ede v. Atrium South OB-GYN, Inc. (1994), 71 Ohio St.3d 124, held and its syllabus reads:

the close of the case this issue was addressed several times and the court specifically asked defense counsel if they wished to insist that this matter be kept from the jury, since the court was concerned as to whether or not such would be error. Defense counsel continued to demand that the jury should not be informed of this "commonality of interest" contrary to the Ohio Supreme Court's mandate in Ede v. Atrium South OB-GYN. Inc., (1994), 71 Ohio St.3d 124. Consequently the court did not permit this information to be given to the jury.

This in and of itself may not have been so prejudicial; however, given the defense primary tactic of attacking the credentials of the expert witnesses of plaintiffs; permitting only the defendants' experts' C.V.'s to go to the jury and the jury not being aware the testimony from the majority of the defense medical experts were from those with a 'commonality of insurance interest' with the defendants does cumulatively arises to an added error which created prejudice. Although violation of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a case will be reversed where the cumulative effect of the errors deprive a party of the constitutional right to a fair trial. (State v. DeMarco, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987)).

* * * * *

"In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause. (Evid.R. 411, applied.)"

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Barbara Gleason,	)	
Plaintiff	)	**ORDER**
	)	
v.	)	Case No.
	)	C-1-93-520
Frank Noyes, M.D., et al.,	)	
Defendants	)	
_____/		

On September 8, 1995, a jury found in favor of defendants on plaintiff's claims of malpractice, inadequate informed consent and negligent infliction of emotional distress arising from the death of plaintiffs husband, William Gleason, during his 1992 admission to Deaconess Hospital for the manipulation of his knee. This matter is before the court on plaintiffs motions for judgment notwithstanding the verdict and for a new trial and defendants' memoranda in opposition. (Docs. 70, 71, 72, 75).

A court can consider a motion for a judgment notwithstanding the verdict, or as it is now called a motion for a judgment as a matter of law, only if the moving party has previously moved for a directed verdict at the close of all the evidence. Fed. R. Civ. P. 50; *Jackson v. City of Cookeville,*

31 F.3d 1354, 1357-1358 (6th Cir. 1994) (citing *Portage H v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1522 (6th Cir. 1990)). When a party has failed to make the pre-verdict motion, the court may not rule on such a motion for judgment made after the verdict. Id.

Plaintiff did not make a motion for judgment as a matter of law at the close of the evidence after defendants rested. *(See* Doc. 60). Therefore, this Court may not consider plaintiffs motion for judgment notwithstanding the verdict.

The motion for a new trial is based primarily on the following grounds: 1) the verdict was against the weight of the evidence; 2) several asserted erroneous evidentiary rulings pertaining to the testimony of expert witnesses; and 3) defense attorney misconduct.

In a diversity case, the question of whether a new trial should be ordered is a .federal procedural question decided by reference to federal law. *Toth v. Yoder Co.*, 749 F.2d 1190, 1197 (6th Cir. 1984). According to federal law, the granting or denying of a new trial is purely within the discretion of the trial court. *Logan v. Dayton Hudson Corp.*, 865 F. 2d 789, 790 (6th Cir. 1989).

In ruling on a motion for a new trial challenging the weight of the evidence, the court must compare the opposing proofs, weigh the evidence, and set aside the verdict only if it determines that the verdict is against the clear weight of the evidence. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993) (citing *Woodbridge v. Dahlberg*, 954 F.2d 1231, 1234 (6th Cir. 1992)). "The motion should be denied if the verdict is one which could reasonably have been reached, and 'the verdict is not unreasonable simply because

different inferences and conclusions could have been drawn or because other results are more reasonable.'" *Id. The* court may not assess witness credibility, a function solely for the jury. *Cooke,* 991 F.2d at 343.

Plaintiff essentially argues that defendants' witnesses were not credible. This Court may not remake the jury's credibility determinations. There was substantial evidence from which the jury could reasonably have reached a verdict for the defendants.

An error in either the admission or exclusion of evidence may not be grounds for granting a new trial unless refusal to take such action is 'inconsistent with substantial justice," Fed. R. Civ. P. 61; *TCP Industries, Inc., v. Uniroyal, Inc.,* 661 F.2d 542, 550 (6th Cir. 1981); or in the case of excluded evidence, the evidence would have caused a different outcome, *Nida v. Plant Protection Ass'n Nat'l,* 7 F.3d 522, 527 (6th Cir. 1993). This Court's rulings limiting the testimony of the expert witnesses in this case were intended, in part, to address issues of unfair surprise to the parties. Because of the abundance of expert testimony in this case from all parties, these limitations did not affect the substantial rights of the plaintiff nor would their absence have made a difference in the outcome of the trial.

Plaintiff's complaint that she was prejudiced by the lengthy curricula vitae of defendants' expert witnesses, contrary to District Judge Rubin's trial procedures, is specious. On February 6, 1995, this case was referred to the Magistrate Judge for final disposition by consent of the parties. The Magistrate Judge met with the parties on three separate occasions substantially in advance of trial (Docs. 22, 27, 30), and at no time did this Court suggest that District Judge Rubin's trial rules would be in effect. The parties were

told that the Magistrate Judge's procedures would be followed at trial. Moreover, at plaintiff's request this Court altered one of Judge Rubin's rulings by allowing plaintiff to call an additional expert witness. Although plaintiff contends that she believed that she. was bound by Judge Rubin's trial procedures to limit experts' curricula vitae to one page, plaintiff did not even .attempt to offer longer curricula vitae. No ruling of this Court prohibited plaintiff from providing the jury with additional information concerning her expert's qualifications, and plaintiff's failure to do so was her own choice.

Only attorney conduct that results in prejudice may serve as a basis for a new trial, *Clarksville-Montgomery County School System v. United States Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991) (citing *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)), and the burden of showing harmful prejudice rests on the moving party, *Clarksville,* 925 F.2d at 1002. The Court must assess whether there is a reasonable probability that counsel's misconduct prevented the jury from reaching a fair or impartial verdict by examining the totality of the circumstances, including the nature of the comment, the court's and the parties' reactions, and the strength of the case. *Davis v. Mutual Life Ins. Co. of New York,* 6 F.3d 367, 387 (6th Cir. 1993) (citing *City of Cleveland,* 624 F. 2d at 756), *cert. denied,* 114 S. Ct. 1298 (1994).

Plaintiffs counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct. Nevertheless, in some instances the Court instructed the jury to disregard counsel's comments. For example, one defense attorney urged the jury at three separate points to "stand beside" his client as he treated and cared for the plaintiff. Despite plaintiffs failure to object, the Court admonished the

jury not to associate itself or put itself in the place of any party but rather to view the case objectively, as judges not advocates.

Although one defendant's attorney inappropriately personally attacked plaintiff's counsel, plaintiff's counsel did not object and responded in kind. At the conclusion of the parties' arguments, the Court noted that it should now be clear why this phase of the trial was called argument, and directed the jury to disregard reference to matters not in evidence. The jury charge again generally instructed the jury that "statements, questions and arguments of counsel are not evidence."

Given plaintiffs general failure to object to defense counsel's conduct, the Court's curative instructions to the jury, the fact that plaintiff's counsel also engaged in similar conduct, and the substantial evidence presented by defendants, we conclude that defense attorneys' conduct did not unduly influence the verdict.

This Court has carefully examined all the other issues raised in plaintiff's motion and found them to be insufficient to warrant a new trial. Accordingly, plaintiffs motions for a judgment notwithstanding the verdict and for a new trial are DENIED.

Date: 12/26/95

/s/_____
Robert A. Steinbert
United States Magistrate Judge

Respectfully submitted,

/s/_____

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OPPOSITION

BRIEF

(3)

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In The

Supreme Court of the United States

October Term, 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,

Petitioner,

vs.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLD, M.D.; DEACONESS HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the United States States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DEACONESS HOSPITAL

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a single evidentiary ruling in a four week trial, which was not directly related to the merits of the case and which the court of appeals determined did not prejudice petitioner's case, warrants review by the Supreme Court of the United States.

2. Whether allegedly inappropriate remarks made by counsel in closing argument, to which petitioner's counsel did not object, and which were not shown to have affected the outcome of the trial, warrant review by the Supreme Court of the United States.

3. Whether petitioner's contention that Federal Rule of Civil Procedure 48 is unconstitutional states a compelling reason for Supreme Court review.

4. Whether it is proper for the petitioner to attempt to raise the issue of the constitutionality of a state statute in the United States Supreme Court when the issue was neither raised nor addressed in the trial court or court of appeals.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 29.6, respondent, Deaconess Hospital, makes the following disclosures:

1. Deaconess Hospital is a not-for-profit corporation.

2. The parent company of Deaconess Hospital is The Deaconess Associations, Inc., which is also a not-for-profit corporation.

3. There are no nonwholly owned subsidiaries of Deaconess Hospital.

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CITATION OF ORDERS AND OPINIONS IN THE COURTS BELOW

A. Order denying plaintiff's motions for a judgment notwithstanding the verdict and for a new trial, United States District Court, Southern District of Ohio, Western Division, Case No.: C-1-93-520 (January 3, 1996) (Appended hereto at 1a-5a).

B. Opinion affirming trial court's denial of plaintiff's motion for a new trial, United States Court of Appeals for the Sixth Circuit, Case Nos.: 96-3194/96/97 (August 29, 1997) (Appended hereto at 6a-14a).

STATEMENT OF THE CASE

Respondents, Frank R. Noyes, M.D., Cincinnati Sportsmedicine & Orthopaedic Center, Inc., Deaconess Hospital, and Jeff Winholt, M.D., were defendants in a medical malpractice, wrongful death suit brought by the petitioner, Barbara Gleason, individually, and as the Executrix of the Estate of William C. Gleason. A four week jury trial in the United States District Court for the Southern District of Ohio, Western Division resulted in a unanimous verdict being rendered by a nine person jury in favor of all defendants. (R. 68). Petitioner then filed a dual "Motion for New Trial/JNOV." (R. 70). Both motions were denied in a four page written Order of the trial court. (R. 76) (Appendix at 1a-5a, hereinafter "App. 00a-00a").

Petitioner then appealed the jury verdict to the United States Court of Appeals for the Sixth Circuit which unanimously affirmed the verdict of the trial court. Next, the petitioner chose to petition the court of appeals for a rehearing en banc which was denied. The petitioner also sought a rehearing from the original panel of appellate judges who heard the case, which was denied on the basis that all issues raised in the petition for

rehearing were fully considered in the original submission to the court of appeals.

In addition to making allegations of medical malpractice, petitioner asserted a cause of action against Deaconess Hospital under the common law of Ohio for negligent infliction of emotional distress. Petitioner alleged Deaconess Hospital violated sections of the Ohio Revised Code which regulate the donation of anatomical gifts. Following Mr. Gleason's death, the Patient Care Supervisor of Deaconess Hospital was required to contact the next-of-kin of Mr. Gleason to determine whether they wished to make an anatomical donation. (T. p. 2020). Deaconess Hospital nurses contacted Ms. Gleason by telephone from the hospital in Cincinnati, Ohio, at her home in Michigan, where she stated her wish to donate "anything that could be used." (T. p. 2007). The telephone consent for the anatomical gift was witnessed by two separate Deaconess Hospital registered nurses who filled out written forms regarding the consent as they spoke to Mr. Gleason on the telephone. (T. pp. 2007, 2034-2035). Certain body parts were then procured by an outside agency not affiliated with the Deaconess Hospital. (T. pp. 2210, 2211). Ms. Gleason now states she placed a restriction on the donation. The above testimony of the nurses and hospital documentation state otherwise. (Joint Trial Exhibits 4009, 4010). The jury made a factual determination that the hospital complied with Ohio law in the manner in which it accepted the anatomical donation.

The petitioner asserted an assignment of error in the court of appeals contending the trial court improperly instructed the jury on Ohio law relating to anatomical donations. The Sixth Circuit ruled that the jury received proper instructions on this issue from the trial judge. (App. 12a-13a). Petitioner now, for the first time, argues to this Court that it should review the constitutionality of the Ohio statute which sets forth the procedure for accepting anatomical gifts.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the United States Supreme Court to review the decisions of the two lower courts in the present case. Similar arguments to those made in the Petition for Writ of Certiorari were heard by the trial court in plaintiff's "Motion for a New Trial/JNOV" and the appeal to the United States Sixth Circuit Court of Appeals. Both courts concluded that while there may have been some error during the course of this intensely litigated four week trial, the petitioner received a fair trial and there was an abundance of evidence in support of the verdict the jury reached.

The essence of petitioner's argument turns on the facts of the case at bar and the arguments made by counsel, which are matters of interest only to the parties hereto. Petitioner is asking this Court to conduct a third review of the lengthy trial record in this case to see if it can find what two previous courts have been unable to find — proof that petitioner received an unfair trial. As was succinctly stated by the court of appeals following its review of the voluminous record in the present case:

> As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair — if imperfect — and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial.

(App. 11a).

It is well settled that fact canvassing is not a task to be served by a grant of a writ of certiorari. *United States v. Johnson*, 268 U.S. 220, 227 (1925). "We do not grant a certiorari to review evidence and to discuss specific facts." *Id.*

I.

A SINGLE EVIDENTIARY RULING IN A FOUR WEEK TRIAL WHICH WAS NOT DIRECTLY RELATED TO THE MERITS OF THE CASE AND WHICH THE COURT OF APPEALS DETERMINED DID NOT PREJUDICE PETITIONER'S CASE DOES NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

Petitioner's contention that the trial court should have admitted evidence that one of the respondents had the same professional liability insurer as two of the numerous expert witnesses who testified in the present case is an issue that has no bearing on respondents Deaconess Hospital and Jeff Winholt, M.D. The respondent whom petitioner contends had a commonality of insurance interest with two expert witnesses is Frank Noyes, M.D. Since the question of admissibility of the identity of insurance carriers is not relevant at all to the claims made by the petitioner against Deaconess Hospital, discussion of this issue herein will be very brief.

It is well established that in diversity cases dealing with procedural matters such as admissibility, the Federal Rules of Evidence apply. *Grenada Steel Indus., Inc. v. Alabama Oxygen, Inc.*, 695 F.2d 883 (5th Cir. 1983); *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985). Even in a diversity case in which the district court would otherwise be required to apply the law of the state in which it is sitting, the Federal Rules of Evidence are controlling over conflicting state laws unless the particular rule in question transgresses either the standard set forth in the Enabling Act, 20 U.S.C. § 2072, or the Constitution. *Hanna v. Plummer*, 380 U.S. 460, 469-474, 85 S. Ct. 1136, 1143-1145 (1965).

As indicated in the brief of petitioner, the trial court refused to admit evidence of Dr. Noyes' insurance carrier based on the dictates of Federal Rule of Evidence 403. Since Rule 403 does not transgress the standards set forth in the Enabling Act or the Constitution, it is controlling, and the trial court properly applied it to exclude evidence of insurance. Moreover, the subject evidentiary issue is an extremely narrow one, applicable only to this case and only one of the multiple respondents in the case. As the court of appeals noted, any evidentiary errors made by the trial court "did not strike at the heart of plaintiff's theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict." (App. 11a). The subject evidentiary question presented by the petitioner certainly does not constitute a compelling issue of public interest calling for Supreme Court review.

II.

REMARKS MADE IN CLOSING ARGUMENT TO WHICH PETITIONER DID NOT OBJECT AND WHICH WERE NOT SHOWN TO HAVE AFFECTED THE OUTCOME OF THE TRIAL DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

A. Counsel for Deaconess Hospital made no argument calculated to appeal to the passion or prejudice of jurors.

Counsel for Deaconess does not claim to be a perfect trial lawyer and in a trial the length of this one, it would not be surprising to find technical errors committed at some point in the proceedings by each of the four trial attorneys who were plying their trade in the courtroom. This was an intensely litigated case; however, no mistake by counsel for Deaconess, if indeed there were any, was calculated. Certainly, there was

no attorney conduct by counsel for Deaconess which was designed to inflame passion and prejudice on the part of the jury, nor did any conduct of Deaconess' counsel have such affect.

Before counsel for Deaconess addressed the jury in closing argument, petitioner's counsel told the jury a conspiracy had been entered into by the respondents. In closing argument, petitioner's counsel accused the hospital physical therapist of agreeing to change her testimony upon the suggestion of defense lawyers. (T. p. 2526). Petitioner's counsel further accused Deaconess Hospital of not performing a thorough enough autopsy because the pathologist was afraid of what he would find, (T. p. 2537), even though there was no testimony during trial to support such scurrilous allegations. It was argued by petitioner that Mr. Gleason died because of a lack of protection from the doctors and hospital nurses. (T. p. 2542).

The vicious attacks against the respondents in closing argument by petitioner's counsel continued when, after implying Dr. Noyes, an internationally known and respected orthopedic surgeon, was a "killer" (T. p. 2524), petitioner's counsel stated that Deaconess Hospital was worse than a street fighter.

> . . . Even street fighters don't kick you when you're down. But at this time in our life, at one of the worst moments in our life, the hospital gets into this anatomical gifts . . .

(T. p. 2544).

When it was the turn of counsel for Deaconess to address the jury, no such underhanded remarks were made about petitioner. Assuredly, argument was spirited, but defense counsel does have rights equal to petitioner's counsel when addressing

the jury in closing argument. In remarks to the jury, attorneys for both the plaintiff and defendants serve as advocates "and proper oratorical emphasis is denied neither." *Henderson v. United States*, 218 F.2d 14 (6th Cir. 1955).

> Final argument has traditionally been just that — argument — an opportunity for counsel to persuade, cajole or convince jurors. Plaintiff's counsel were not limited in any anecdotes they told . . . A defense counsel, in seeking to persuade the jury should be given same entitlement.

In re: Richardson-Merrell, Inc. v. Bendectin Prod. Liab. Litig., 624 F. Supp. 1212, 1226 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290, *cert. denied*, 488 U.S. 1006, 109 S. Ct. 788 (1989).

As Justice Rehnquist has opined:

> [C]losing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify [attorney] misconduct, they do suggest that a court should not lightly infer that [counsel] intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-647, 94 S. Ct. 1868, 1873 (1974).

Petitioner's brief attempts to paint a picture of courtroom anarchy and rampant incivility by defense counsel. This is an entirely false picture. In the instant case, not only did the trial

judge address the issue of alleged defense attorney misconduct and dismiss it, (App. 5a), he went out of his way to compliment the attorneys on the presentation of their respective cases, stating on the record at the close of trial:

> While we are talking about the attorneys in the case, I would like to just comment that I feel that attorneys have done an excellent job in trying this case. They have demonstrated professional courtesy that we expect to see here in the Federal Court . . . Although the attorneys have vigorously presented their positions, they have been cordial and courteous to each other and its been a pleasure to have them try this case.

(T. p. 2486).

Finally, at the conclusion of the trial, after the jury was excused and while all counsel were still in the courtroom, the trial judge again complimented all the attorneys, informing the parties they could not have been represented any better than they were. (T. p. 2660).

B. In dealing with allegations of improper argument by counsel, the trial judge is afforded wide discretion.

It has been said that in reviewing allegations of alleged attorney misconduct, the trial judge is entrusted with wide discretion because he is in the best position to appraise the affect of the allegedly improper argument of counsel. *Reed v. Philadelphia, Bethlehem & New England Co.*, 939 F.2d 120 (3rd Cir. 1991); *VanSkike v. Union Pacific R. Co.*, 725 F.2d 146 (8th Cir. 1984). The general rule is that decisions of a trial judge based on the assessment of the prejudicial impact of allegedly improper argument of counsel is entitled to *great*

deference. Arizona v. Washington, 434 U.S. 497, 514, 98 S. Ct. 824, 835 (1978) (emphasis added). Whether or not gross prejudice has resulted from improper conduct of opposing counsel is a determination that "rests primarily in the judicial discretion of the trial court." *Davis v. Mutual Life Ins. Co. of N.W.*, 6 F.3d 367, 387 (6th Cir. 1993). Neither oratorical exaggeration nor provocative remarks in closing arguments should cause reversal of a jury verdict if a trial court has determined the arguments were not grossly prejudicial. *VanSkike v. Union Pacific R. Co.*, 725 F.2d 1146 (8th Cir. 1984). "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 242-243, 60 S. Ct. 811, 853.

The authority to grant a new trial based upon prejudice resulting from attorney misconduct "is confided almost entirely to the exercise of discretion on the part of the trial court." *Clarkesville Montgomery Co. Sch. Sys. v. United States Gypsum Co.*, 925 F.2d 993 (6th Cir. 1991). Absent an abuse of discretion, the trial court's denial of a motion for a new trial as a result of alleged attorney misconduct should not be disturbed. *Clarkesville Montgomery Co. Sch. Sys. v. United States Gypsum Co.*, 925 F.2d at 1003. In the case at bar, the trial judge reviewed plaintiff's post verdict allegations of misconduct by defense counsel and in its written opinion appended hereto concluded "defense attorneys conduct did not unduly influence the verdict." (App. 5a).

C. Petitioner did not object to the alleged improper argument.

Perhaps the most revealing aspect of petitioner's post verdict accusations of attorney misconduct is the fact that petitioner did not object at any time before receiving an adverse jury verdict

to these alleged improprieties which are now contended to be so grievous. The trial judge pointed out in ruling on petitioner's post trial motion, in which the petitioner's objected for the first time to certain remarks made during closing argument, that "[p]laintiff's counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct." (App. 5a). Likewise, Judge Ryan of the Sixth Circuit Court of Appeals stated:

> [T]he plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsel's benign reference to an expert finding service, concerning whose activities there was evidence of record . . . [P]laintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel out of the jurors hearing to desist from further impermissible statements. Instead, save for one objection — and that one meritless — counsel for plaintiff did nothing.

(App. 9a).

It is a telling fact that at the time these allegedly improper remarks were made, none of the professional participants in the trial, the trial judge, defense counsel, or plaintiff's counsel felt that any improper argument had been made. Deaconess denies it made any improper arguments to the jury. However, even if, *in arguendo*, there were objectionable mistakes made in closing argument by counsel for Deaconess, petitioner failed to preserve them for review.

Counsel "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the

first time on the point that the comments to the jury were improper and prejudicial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238, 60 S. Ct. 811, 851 (1940).

> There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial. It is the duty of counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception.

Crumpton v. United States, 138 U.S. 361 (1891). The reason for the rule is to enable the trial court to deal with the matter. *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55 (8th Cir. 1947).

D. The jury verdict was supported by an abundance of evidence.

In the present case, both the trial and appellate courts performed the appropriate analysis of petitioner's accusations and reached the correct result. The court of appeals held that "plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice." (App. 11a). The appellate judges unanimously concluded plaintiff did not meet this burden, specifically holding that "[t]he verdict is well supported by the evidence" and that there was an "abundance of evidence that the defendants were not liable for William Gleason's injuries and death." (App. 11a).

Suffice it to say that the trial court was correct in ruling there was no undue prejudice to the parties resulting from the

closing arguments of counsel (App. A-4) and the court of appeals properly found petitioner received a "fair" trial, "supported by the properly admitted evidence." (App. 11a).

III.

PETITIONER'S CONTENTION THAT FEDERAL RULE OF CIVIL PROCEDURE 48 IS UNCONSTITUTIONAL DOES NOT STATE A COMPELLING REASON FOR UNITED STATES SUPREME COURT REVIEW.

A nine person jury was impaneled at the commencement of trial. The trial judge informed all counsel four weeks before trial that the local practice was to seat a jury of six plus one extra juror for each anticipated week of trial to guard against the potential of a mistrial should jurors become ill or otherwise indisposed during trial. (R. 83, p. 30). No party objected to this procedure at the time. (*Id.*)

The Seventh Amendment of the Constitution requires that a jury be comprised of "a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community." *Colgrove v. Battin*, 413 U.S. 49, 160 n.16, 93 S. Ct. 2448 (1973); *Hanson v. Parkside Surgery Ctr.*, 872 F.2d 745 (6th Cir. 1989). Fed. R. Civ. P. 48 did away with the practice of seating alternate jurors. It states in pertinent part that

> [t]he court shall seek a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict . . . No verdict shall be taken from a jury reduced in size to fewer than six members.

Fed. R. Civ. P. 48. The rule has been in effect since 1991 and no court has found it to be in violation of the Seventh Amendment.

While petitioner claims Rule 48 is unconstitutional, no authority is cited in support of this assertion. Federal rules regulating matters indisputably procedural or matters capable of classification as either substantive or procedural are "*a priori* constitutional." *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5, n.3, 107 S. Ct. 967, 97 n.3 (1987). As Rule 48 regulates procedural matters (the number of jurors participating in the verdict), it is *a priori* constitutional. It has been said, if anything, juries of more than six persons increase the reliability of verdicts. *Hanson*, 872 F2d at 750, citing *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029 (1978).

As the Sixth Circuit properly noted in its Opinion below:

> [T]here is nothing fundamentally unfair about having to potentially convince six, seven, eight or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors increases the reliability of verdicts. Citing, *Ballew, supra.*

(App. 14a).

Petitioner has failed to articulate any compelling reason for this Court to analyze the constitutionality of Rule 48. The rule is *a priori* constitutional and petitioner has put forth no logical

argument in support of the contention that it is generally unfair to plaintiffs.

IV.

PETITIONER'S ASSERTION THAT THE OHIO STATUTE ON ANATOMICAL DONATIONS IS UNCONSTITUTIONAL IS NOT APPROPRIATE FOR UNITED STATES SUPREME COURT REVIEW BECAUSE THE ISSUE WAS NEITHER RAISED NOR RULED UPON IN THE LOWER COURTS AND NO COMPELLING PUBLIC INTEREST IN THE ISSUE EXISTS.

The jury in the instant case returned a verdict in favor of Deaconess Hospital and answered a special interrogatory specifically stating the Deaconess nurses were not negligent in the manner in which they accepted petitioner's anatomical donation. (App. 15a). Petitioner then argued in the court of appeals that the trial court committed error in instructing the jury on Ohio law regarding the procedure for accepting anatomical donations. (*See* Assignments of Error Nine and Ten asserted by petitioner in the Sixth Circuit Court of Appeals, App. 17a). The appellate court ruled that the trial court had indeed properly instructed the jury on the anatomical donation issue. (App. 12a-13a).

In the Petition for Writ of Certiorari, petitioner has abandoned the argument made to the court of appeals that the jury was erroneously instructed on Ohio law regarding anatomical donations. The petitioner now argues for the first time that the Ohio statute relating to the procedure for accepting anatomical donations violates petitioner's constitutional Fifth Amendment due process rights.

It has long been held that this Court normally will not review an issue which was not raised in the case in the lower courts. *Miree v. DeKalb Co.*, 433 U.S. 25, 33-34, 97 S. Ct. 2490 (1977). Justice Rehnquist ruled that "since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it." *Id.* An identical situation is presented by petitioner's fourth question presented for review in the case at bar. The issue was neither pleaded, argued nor briefed either in the district court or in the court of appeals.

As was more recently stated by this Court:

> . . . Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court . . . but also assists us in our deliberations by promoting the creation of an adequate factual and legal record . . . And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 117 S. Ct. 1028, 1031 (1997). When a legal argument is such an afterthought that it was not even raised at either lower court level, it "may be some indication of its merit." *Miree v. Dekalb Co.*, 433 U.S. at 34.

A compelling reason for review is required before this Court will grant a petition for writ of certiorari. Sup. Ct. R. 10. Such compelling reasons imply issues beyond the academic or episodic, particularly when the issues are constitutional in nature. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955). "Certiorari is granted only in cases involving principles, the settlement of which is important to the public, as distinguished from that of the parties. . ." *NLRB v. Pittsburg S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453 (1951); *Rice v. Sioux City Memorial Park Cemetery, supra.*

It is noteworthy that the statute to which the petitioner is asking this Court to apply Fifth Amendment scrutiny (R.C. § 2108.08) has been in effect since 1991 with no other reported challenge to its constitutionality. There is no public clamoring that the statute is unfair or misguided as the petitioner asserts. The constitutional issue petitioner is attempting to raise can therefore not be characterized as a compelling issue of public interest.

At trial, plaintiff argued Deaconess failed to comply with the anatomical donation statute. The jury disagreed. In the court of appeals, plaintiff's contention was the jury was improperly instructed on Ohio law regarding anatomical donations. With this argument, the Sixth Circuit Court of Appeals disagreed. The afterthought argument that the Ohio statute is unconstitutional, which petitioner now asserts for the first time in the Petition for Writ of Certiorari, is not an issue which meets the compelling interest threshold of Supreme Court Rule 10.

CONCLUSION

Both the trial court, in ruling on petitioner's "Motion for a New Trial/NOV," and the Sixth Circuit Court of Appeals have reviewed numerous assertions made by petitioner that there was error in the subject four week jury trial. Both courts reviewed the contentions and concluded the petitioner received a fair trial and that there was abundant evidence in support of the verdict reached. No compelling reason is present to trigger review by this Court of the lengthy factual record in this case. Respondent, Deaconess Hospital, therefore respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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